A **ALAGAN MAYALAGAN v. KETUA PENGARAH PERKHIDMATAN AWAM & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[JUDICIAL REVIEW NO: WA-25-236-12-2016]
B 5 DECEMBER 2018

LABOUR LAW: *Pensions – Pension adjustment – Applicant's last drawn salary adjusted to be equivalent of Crane Driver (Low Carriage) at salary grade D38 – Applicant claimed adjustment of pension should be equivalent to salary grade D5 for*
C *Crane Driver (High Portal) – Application for an order of certiorari to quash decision of first respondent rejecting applicant's appeal for adjustment of pension – Whether first respondent failed to take into account meaning of word 'portal' – Whether procedurally proper to adjust applicant's pension to that based on a lower position than position he held at time of his retirement – Rules of natural justice – Whether*
D *breached – Whether first respondent had duty to act fairly to correct its wrongful adjustment of applicant's pension – Whether applicant had legitimate expectation – Whether first respondent's decision to dismiss applicant's appeal irrational and unreasonable – Pensions Adjustment Act 1980, ss. 3, 13*

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for –*
E *Application for an order of certiorari to quash decision of first respondent rejecting applicant's appeal for adjustment of pension – Applicant's last drawn salary adjusted to be equivalent of Crane Driver (Low Carriage) at salary grade D38 – Applicant claimed adjustment of pension should be equivalent to salary grade D5 for Crane Driver (High Portal) – Whether first respondent failed to take into account meaning*
F *of word 'portal' – Whether procedurally proper to adjust applicant's pension to that based on a lower position than the position he held at time of his retirement – Rules of natural justice – Whether breached – Whether first respondent had duty to act fairly to correct its wrongful adjustment of applicant's pension – Whether applicant had legitimate expectation – Whether first respondent's decision to dismiss*
G *applicant's appeal irrational and unreasonable – Pensions Adjustment Act 1980, ss. 3, 13*

The applicant was an employee of Keretapi Tanah Melayu ('KTM') from 29 April 1938 until 4 March 1971. He held the position of crane driver (portal') and worked in KTM's Port Traffic Department at Port Klang. He
H was compulsorily retired on 5 March 1971 under s. 10G of the Pensions Ordinance 1951. He received a pension based on the last drawn salary of a crane driver (portal). The Pensions Adjustment Act 1980 ('PAA 1980') came into force on 1 July 1980 and s. 3(1) provides that the pensions granted to officers shall be adjusted annually by an increment of two percent. Under the
I PAA 1980, the applicant's last drawn salary was adjusted on 1 July 1980 to RM510 under the new salary scheme of Skim Jawatankuasa Kabinet II ('JKK II') to be equivalent to that of Crane Driver (Low Carriage) at salary grade D38. The applicant claimed that the adjustment of his pension under

the PAA 1980 should have been equivalent to the salary grade D5 for Crane Driver (High Portal). The applicant's appeal to the first respondent for a readjustment of his pension to the last drawn salary of a Crane Driver (High Portal) at the salary grade D5 was rejected on the grounds that under the Pension Division's Sifir Pemindahan Gaji (Salary Transfer Multiplication Table), the position of crane driver (portal) was under salary code D38 and not D5. The applicant appealed against the rejection but the respondent still rejected it on grounds that the words 'high portal' reflected a higher skill to undertake more complex works and responsibilities and that 'high portal' crane drivers were put at a higher salary scale than 'portal' crane drivers. The applicant appealed against the decision and again, the first respondent rejected the appeal on the basis that the appellant had retired as a crane driver (portal) and not Crane Driver (High Portal). After another appeal by the applicant was rejected on 5 September 2016, the applicant filed a judicial review action to challenge the first respondent's decision. The applicant sought, *inter alia*, an order of *certiorari* to quash the decision of the first respondent to reject the applicant's appeal for an adjustment of his pension; a declaration that the applicant was entitled for the pension adjustment based on a last drawn salary equivalent to grade D5 (JKK) from 1 July 1980; and (iii) an order of *mandamus* directing the respondents to readjust the applicant's pension calculated based on a last drawn salary of RM510 equivalent to grade D5 (JKK) from 1 July 1980.

Held (allowing application):

(1) The Pensions Adjustment (Amendment) Act 1983 received its royal assent on 28 November 1983 and came into force retrospectively on 1 July 1980. Therefore, although the Pensions Adjustment (Amendment) Act 1983 received its royal assent in 1983, which was after the first respondent's decision in 1982 to reject the applicant's application to readjust his pension, ss. 13 and 13A of PAA 1980 applied to the first respondent's adjustment of the applicant's pension. Under s. 13 of the PAA 1980, the first respondent upon receipt of such information as was sufficient to enable him to redetermine the proper amount of pension was obliged to redetermine the applicant's proper amount of pension. (paras 31 & 32)

(2) The first respondent's decision to dismiss the applicant's appeal to readjust his pension from the last drawn salary of a Crane Driver (Low Carriage) at salary grade D38 to that of Crane Driver (High Portal) at salary grade D5 was irrational and unreasonable. The first respondent failed to take into account the meaning of the word 'portal' as defined in the English language dictionaries. The first respondent chose to take into account irrelevant information *ie*, the opinion of the KTMB's Human Resources Department's Advisor as to what was meant by the word 'portal' and 'high portal.' The said Advisor had stated that 'high portal' means 'high skill' and that 'portal' means 'normal experience' or 'low skill'. Obviously, his view of what 'portal' meant was clearly not

in accordance with the actual definition of 'portal' in the English language dictionaries where 'portal' was defined as a door or entrance. There was no evidence that the KTMB's Human Resources Advisor was a linguist or an expert in the English language or had actual knowledge of port operations at Port Klang, (paras 38, 39, 46 & 47)

(3) The applicant had worked under the supervision of one Paramas Varan Kandiah ('Kandiah'), the Assistant Wharf Superintendent of Port Swettenham from 17 June 1963 to 10 October 1969. It was confirmed by Kandiah that Port Swettenham only used portal cranes and low carriage cranes as the wharves. He stated that at that time, the portal cranes were considered as portal cranes and high portal cranes; and that the crane drivers could be asked to work on any crane based on the discretion of the respective Port officers. It would have been reasonable for the first respondent to have taken into account Kandiah's explanation of what the job entailed. Further, at the time of the applicant's retirement, there was no position described as Crane Driver (High Portal). There were only the positions of crane driver (portal) and Crane Driver (Low Carriage). And that under the JKK salary scheme, there was no position described as crane driver (portal); there was only Crane Driver (High Portal). (paras 44, 45 & 46)

(4) The first respondent's decision to adjust the applicant's pension on 1 July 1980 based on the last drawn salary of Crane Driver (Low Carriage) from crane driver (portal) just because the new salary classification under JKK II was Crane Driver (Low Carriage) and Crane Driver (High Portal) to be procedurally improper and contrary to the rules of natural justice. The last drawn salary for Crane Driver (Low Carriage) was less than that of a crane driver (portal). Therefore, it was against the rules of natural justice for the first respondent to adjust the applicant's pension based on a position that was lower than the applicant's position at the time of his retirement in 1971. An adjustment that resulted in a situation which was less favourable for a pensioner than before the coming into force of the PAA 1980 was also against the spirit of the PAA 1980 embodied in s. 3. (paras 49, 50 & 52)

(5) The first respondent had a duty to act fairly to correct its wrongful adjustment of the applicant's pension to Crane Driver (Low Carriage) at salary grade D38. Hence, it was under a duty to readjust the applicant's pension to Crane Driver (High Portal) at salary grade D5 which was the position and salary grade under JKK II equivalent and/or closest to the position that the applicant was holding at the time of his retirement. The applicant also had a legitimate expectation that the first respondent would readjust his pension. Accordingly, the first respondent's decision to dismiss the applicant's appeal and its refusal to readjust the applicant's pension was irrational, unreasonable and procedurally improper. (paras 54 & 55)

Case(s) referred to:

Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia & Anor [1998] 1 CLJ 227 CA ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Legislation referred to:

Pensions Act 1980, ss. 6, 8

Pensions Adjustment Act 1980, ss. 3(1), 13, 13A

Rules of Court 2012, O. 53 r. 4

For the applicant - Manoharan Malayalam; M/s M Manoharan & Co

For the respondents - Mohammad Sallehuddin Md Ali & Syahriah Shapiee; FCs

Reported by Suhainah Wahiduddin

JUDGMENT

Faizah Jamaludin JC:

Introduction

[1] This is the applicant's substantive application for judicial review seeking for:

(i) an order of *certiorari* to quash the decision of the first respondent to reject the applicant's appeal for an adjustment of his pension based on last drawn salary equivalent to grade D5 (JKK) from 1 July 1980 as stated by Puan Fazidah binti Ahmad Puat in a letter dated 5 September 2016 from the Bahagian Pasca Perkhidmatan, Jabatan Perkhidmatan Awam Malaysia;

(ii) a declaration that the applicant is entitled for the pension adjustment based on a last drawn salary equivalent to grade D5 (JKK) from 1 July 1980;

(iii) An order of *mandamus* directing the respondents to readjust the applicant's pension calculation based on a last drawn salary of RM510 equivalent to grade D5 (JKK) from 1 July 1980 and pay all arrears to the applicant; and

(iv) General damages to be assessed.

[2] Having considered the applicable facts and law, this court allowed the applicant's application for an order of *certiorari* to quash the first respondent's decision. Further, this court directed the first respondent (a) to redetermine the proper amount of pension payable to the applicant based on a last drawn

A salary of a crane driver (high portal) equivalent to grade D5 (JKK), and (b) to pay the applicant the said proper amount of pension payable, together with arrears, from 1 July 1980.

[3] There are no orders made for declaration and general damages.

B **[4]** The reasons for the decision are as stated herein.

The Facts

[5] The applicant was an employee of Keretapi Tanah Melayu ("KTM") from 29 April 1938 until 4 March 1971. He was loaned by KTM to Port Swettenham (also known as Port Klang). He held the position of crane driver C (portal) and worked in KTM's Port Traffic Department at Port Klang. He was compulsorily retired on 5 March 1971 under s. 10G of the Pensions Ordinance 1951.

[6] At the time of the applicant's retirement, his last drawn salary was D RM360 under the Skim Suffian. The applicant retired as a crane driver (portal).

[7] The applicant's retirement form (borang persaraan) dated 11 January 1973 sent by KTM Berhad to the Accountant General (Akauntan Negara Malaysia) showed that he retired as a crane driver (portal) and received a E pension based on the last drawn salary of a crane driver (portal).

[8] The applicant is deemed a pensionable officer under s. 8 of the Pensions Act 1980. Under s. 6 of the Pensions Act 1980, pensions are computed based on "the last drawn salary", which is defined as "the last drawn monthly substantive salary".

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[9] The Pensions Adjustment Act 1980 ("PAA 1980") came into force on 1 July 1980. Section 3(1) of the PAA 1980 provides that the pensions granted to officers shall be adjusted annually by an increment of two percent in accordance with the provisions of the Act and shall be paid with effect from January of each year.

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[10] Under the PAA 1980, the applicant's last drawn salary was adjusted on 1 July 1980 to RM510 under the new salary scheme of Skim Jawatankuasa Kabinet II ("JKK II") to be equivalent to that of crane driver (low carriage) at salary grade D38. The salary grade D5 for crane driver (high portal) and D38 for crane driver (low carriage) were established under the H JKK II. The position of crane driver (portal) was not included in the JKK II salary scheme. The Lembaga Pelabuhan Klang table on Pemindahan Kepada Tanggagaji Baru below shows that crane driver (high portal) had the salary code of D5. There was no position of crane driver (portal) and crane driver (low carriage) in the list below.

I

LEMBAGA PELABUHAN KLANG

Pemindahan Kepada Tanggagaji Baru 1.7.1980

Kumpulan 'D'

Nama Jawatan	Kod Gaji
Konsol Operata Kanan	D1
Pomen Kapal	D1
Konsol Operata	D3
Penyelia Mesin Operata	D3
Pemandu Keren (Straddle Carrier/Kontena)	D3
Pemandu Keren (Kapal Korek)	D3
Serang Peringkat Khas	D3
Pemandu Injin Peringkat Khas	D3
Pemandu Kren (High Portal)	**D5**
Serang I	D7
Pemandu Injin I	D7
Juruteknik Muda	D10
Opereta Mesin Kira	D12

[11] The first respondent's circular dated 25 March 1992 to Chief Secretaries of Ministries and Heads of Departments showed in lampiran 1A that the *ad hoc* service scheme established for the Klang Port Authority and their respective salary codes are as follows:

Nama Skim Perkhidmatan *Ad Hoc*	Kod Gaji
Pemandu Kren (Kapal Korek)	D3
Pemandu Kren (Jentry Bulk)	D3
Pemandu Kren (High Portal)	**D5**
Pemandu Jentera Pemunggah	D35
Pemandu Kren (Low Carriage)	**D38**

[12] The applicant claims that the adjustment of his pension under the PAA 1980 should have been equivalent to the salary grade D5 for crane driver (high portal) and not salary grade D38, which was for crane driver (low carriage).

[13] After his pension was adjusted by the first respondent under the PAA 1980 from that of a crane driver (portal) to that of a crane driver (low carriage) at salary grade D38, the applicant appealed to the first respondent for a readjustment of his pension to the last drawn salary of a crane driver (high portal) at the salary grade D5.

[14] The first respondent in a letter dated 21 August 1982 to the applicant's then solicitors, stated that based on their adjustment calculator, the position of crane driver portal had the salary code D38 and not D5. The application's request for a review of his readjusted pension was rejected by the Pension Division on the grounds that under the Division's Sifir Pemindahan Gaji (Salary Transfer Multiplication Table), the position of crane driver portal is under salary code of D38 and not D5 as claimed. Paragraphs 4 and 5 of the said letter is reproduced below:

> 4. Mengikut rekod-rekod yang disimpan di pejabat ini En Mayalagan Alagan telah bersara pada 5.3.1971 dan gaji akhir yang beliau terima ialah $360.00 (Skim Suffian). Berdasarkan prinsip-prinsip seperti dinyatakan di perenggan 3, gaji akhir $360.00 dalam Skin Suffian dipindah kepada mata gaji $510.00 dalam Skim baru iaitu Skim Jawatankuasa Kabinet II melalui Skim Harun dan Skim Skim Jawatankuasa Kabinet I.
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> 5. Berhubung dengan tuntutan beliau bagi perletakan ke Kod D5 crane Driver Portal dengan gaji maksima $720.00, dukacita dimaklumkan bahawa mengikut Sifir Pemindahan Gaji di pejabat ini, jawatan tersebut adalah dibawah Kod Gaji D38 dan bukan D5 sebagaimana yang dinyatakan. Oleh yang demikian, penyelarasan yang telah dibuat adalah betul dan teratur.

[15] The first respondent's basis, as stated in its letter, for rejecting the applicant's request was clearly wrong. There was no position of crane driver (portal) in the JKK II. Therefore, it was wrong for the first respondent to state that the salary code for crane driver (portal) is D38. D38 is the salary code for crane driver (low carriage).

[16] The applicant appealed the rejection. The first respondent in a letter date 25 January 2007 stated it was willing to reconsider the appeal taking into account the additional information provided by the applicant relating to the background of the applicant's duties when he was loaned to Port Klang's administration. The first respondent stated that it recognised that the applicant's duties involved the handling of high portal crane and not low carriage equipment. It stated:

> Jabatan ini juga mengambil maklum bahawa tugas-tugas tuan melibatkan pengendalian "High Portal Crane" dan bukan alat "Low Carriage".

[17] The first respondent went on to say that it will obtain additional explanation from the Kesatuan Pekerja-Pekerja Keretapi Tanah Melayu ("KTMB's Workers Union") since the applicant's work situation took place more than 30 years ago and that it had to discuss with the KTMB's Workers

Union, Keretapi Tanah Melayu Berhad and the Port Klang Authority, the difference between the positions of crane driver "high portal" and crane driver "low carriage" and how the difference was dealt with during the fixing of salaries under the pre-Suffian, Suffian and Harun salary schemes.

[18] However, after obtaining the additional information, the first respondent in a letter dated 13 May 2008, rejected the applicant's appeal on the grounds that the words "high portal" reflected a higher skill to undertake more complex works and responsibilities. It stated that "high portal" crane drivers were put at a higher salary scale than "portal" crane drivers. It concluded by stating that the decision to put the applicant at the salary code of D38 for crane drivers (low carriage) is correct.

[19] The applicant appealed against the decision *via* a letter dated 3 July 2008. Again, on 29 August 2012, the first respondent rejected the applicant's appeal on the basis that he retired as a crane driver (portal) and not crane driver (high portal). The first respondent failed to take into consideration that at the time of the applicant's retirement that there was no position named crane driver (high portal); there were only positions named crane driver (portal) and crane driver (low carriage).

[20] The applicant filed another appeal, through his solicitors on 15 June 2016, for his pension to be readjusted to a last drawn salary for crane driver (high portal) at salary grade D5.

[21] The first respondent rejected his appeal on 5 September 2016. The reason for the rejection was as follows:

> 2.Untuk makluman, Jabatan ini telah meniliti permohonan Encik Alagan A/L Mayalagan dan bagi membantu menerangkan kedudukan isu berbangkit, beberapa siri perbincangan telah diadakan dengan Keretapi Tanah Melayu Bhd (KTMB) selaku pihak yang mengambil alih pengerusan Keretapi Tanah Melayu yang telah diswastakan pada tahun 1990 dan Kesatuan Pekerja-Pekerja KTMB. Berdasarkan fakta yang dikemukakan adalah jelas bahawa semasa persaraan wajib 05.03.1971, beliau telah menyandang jawatan Pemandu Keren (Portal) dan oleh yang demikian Jabatan ini mendapati bahawa proses pengiraan faedah pencen pengadu adalah teratur dan mengikut peraturan pencen. Sehubungan itu, rayuan agar penyelarasan pencen dikira semula berdasarkan gaji akhir bersamaan di Gred D5 (JKK) mulai 1 Julai 1980 tidak dapat dipertimbangkan.

[22] The applicant filed this judicial review action to challenge the first respondent's decision on 5 September 2016.

The Law On Judicial Review

[23] Judicial review is regulated by O. 53 of the Rules of Court 2012 ("ROC"). It provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is the decision of any public authority. Order 53 r. 4 of the ROC states that:

A Any person who is adversely affected by the decision of any public authority shall be entitled to make the application [for judicial review]".

[24] The applicant was adversely affected by the first respondent's dismissal of his appeal for his pension to be readjusted based on the last drawn salary for crane driver (high portal) at the salary grade D5.

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[25] One of the foremost principles of judicial review is that the High Court in dealing with matters relating to the exercise of discretion of public bodies, is that the court does not act as an appeal court in such matters: see the *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9 (SC). Judicial review, as C Lord Brightman stated in *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155, "is not an appeal from a decision, but a review of the manner in which the decision was made."

[26] In *Michael Lee Fook Wah v. Menteri Sumber Tenaga Manusia, Malaysia* D *& Anor* [1998] 1 CLJ 227; [1998] 1 MLJ 305, the Court of Appeal reiterated the same principle in relation to applications for *certiorari*, where Shaik Daud Ismail JCA said:

> First and foremost, it must be emphasised that in an application for *certiorari*, **the High Court is not sitting in its appellate jurisdiction but** E **in its supervisory jurisdiction. The court is more concerned with the decision-making process and not on the decision itself**. The court should not readily question the administrative decision of the 1st respondent as that is his absolute discretion. If the 1st respondent had acted *ultra vires*, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The F underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review. (emphasis added)

[27] In the House of Lords case of *Council of Civil Service Unions v. Minister* G *for the Civil Service* [1985] AC 374 (the "*CCSU* case"), Lord Diplock in his speech devised a new nomenclature for three grounds upon which administrative action is subject to control by judicial review, which are (i) "illegality", (ii) "irrationality", and (iii) "procedural impropriety". This classification for judicial review was adopted by our courts in *Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor* [1999] 4 CLJ 121.

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[28] Lord Diplock classified the three heads of judicial review in the *CCSU* case as follows:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come I about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "**illegality**," the second "**irrationality**" and the

third "**procedural impropriety**." That is not to say that further development on a case by case basis may not in course of time add further grounds.

...

"By **"illegality"** as a ground for judicial review I mean that **the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it**. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

"By **"irrationality"** I mean what **can by now be succinctly referred to as "*Wednesbury* unreasonableness"** (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223). *It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. ... "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."

"I have described the third head as "**procedural impropriety**" rather than **failure to observe basic rules of natural justice or failure to act with procedural fairness** towards the person who will be affected by the decision. This is because *susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred*, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all." (emphasis added)

[29] "Illegality" was succinctly summarised by Lord Roskill in the *CCSU* case as "the exercise of power that does not exist". His Lordship held that the often-called "principles of natural justice" is often widely misunderstood and misused and it be better replaced by "a duty to act fairly". Lord Roskill held that:

The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or action preceding the decision complained of and that that "reasonable expectation" was not in the event fulfilled.

Analysis And Findings Of This Court

[30] The Pensions Adjustment (Amendment) Act 1983 amended the s. 13 of PAA 1980 and introduced a new s. 13A to the PAA 1980. The amended s. 13 and the new s. 13A of the PAA 1980 reads as follows:

13. Where information not sufficient to determine amount of pension, etc.

Where, for the purpose of granting and adjusting or adjusting any pension or other benefit under this Act, the Director General is not in possession of sufficient information to enable him to determine the amount of pension or other benefit payable, the amount payable shall, in the case of:

(a) a pension or retiring allowance, be fifty per cent of the highest pension or retiring allowance payable to an officer of an equivalent grade on the current salary scale as the officer whose pension or retiring allowance is to be adjusted under this Act;

...

"13A. Director General may redetermine proper amount of pension or other benefit.

(1) Where any pension or other benefit is granted under any other written law and adjusted under this Act or granted and adjusted under this Act in the circumstances referred to in section 13 and subsequent thereto the Director General receives such information as is sufficient to enable him to re-determine the proper amount of pension or other benefit payable, he shall re-determine the same.

(2) Where, upon re-determination under subsection (1), the proper amount of pension or other benefit payable is found to be:

(a) less than the amount paid under section 13, the proper amount shall be payable instead with effect from the date of re-determination and the amount overpaid shall be deemed to have been overpaid by mistake of fact but shall, however, not be recoverable from the person concerned; or

(b) more than the amount paid under section 13, the proper amount shall be payable instead together with arrears, if any.

Retrospective Application Of The s. 13 And s. 13A Of The PAA 1980

[31] The Pensions Adjustment (Amendment) Act 1983 received its royal assent on 28 November 1983 and came into force retrospectively on 1 July 1980. Therefore, although the Pensions Adjustment (Amendment) Act 1983 received its royal assent in 1983, which is after the first respondent's decision in 1982 to reject the applicant's application to readjust his pension, s. 13 and s. 13A of PAA 1980 applied to the first respondent's adjustment of the applicant's pension.

[32] Under s. 13A of the PAA 1980, the first respondent upon receipt of such information as is sufficient to enable him to redetermine the proper amount of pension is obliged to redetermine the applicant's proper amount of pension. Section 13A(1) of the PAA 1980 states that:

(1) Where any pension or other benefit is granted under any other written law and adjusted under this Act or granted and adjusted under this Act in the circumstances referred to in section 13 and subsequent thereto **the**

> **Director General receives such information as is sufficient to enable him to re-determine the proper amount of pension or other benefit payable, he shall** re-determine the same. (emphasis added)

Information Received By First Respondent After The Amendment Of s.13 And Insertion Of s. 13A To The PAA 1980

[33] Subsequent to the first respondent's adjustment of the applicant's pension under the PAA 1980 on 1 July 1980 and the amendment of s. 13 and the insertion of s. 13A to the PAA 1980 by the Pensions Adjustment (Amendment) Act 1983, the first respondent received the following information:

(i) that at the time of the applicant's retirement in 1971, only the positions of crane driver (portal) and crane driver (low carriage) existed. However, there were no salary grades for these positions at that time;

(ii) that the position of crane driver (high portal) and the salary grade of D5 for crane driver (high portal) were established by the Lembaga Pelabuhan Klang on 1 July 1980 under the JKK II;

(iii) that the *ad hoc* service schemes of crane driver (high portal) with a salary grade D5 and crane driver (low carriage) with a salary grade D38 were shown in the first respondent's circular dated 25 March 1992 to Chief Secretaries of Ministries and Heads of Departments; and

(iv) that the Koperasi Keretapi Berhad, *via* a letter dated 1 June 2010, signed by the applicant's former supervisor, stated that during the applicant's period of employment at Port Swettenham (Port Klang), the Port only used portal cranes and low carriage cranes on the wharves. Additionally, at that time, portal cranes were considered as portal cranes and high portal cranes; and that the crane drivers can be asked to work on any crane based on the discretion of the respective port officers.

[34] The first respondent in its letter to the applicant dated 25 January 2007 expressly stated that it recognised that the applicant's duties involved the handling of high portal cranes and not low carriage equipment. However, it needed to get further explanation from the KTMB's Workers Union, Lembaga Pelabuhan Klang and KTMB.

[35] The Advisor to KTMB's Human Resources Department, Encik Mohamad Abas, in a letter dated 25 February 2008 to the first respondent, stated that in his opinion the word "high portal" reflects high skill, whereas the word "portal" reflects a normal skill, which can be classified as "low". Paragraph 7 of Encik Mohamad Abas' letter is reproduced below (the emphasis in bold are all his):

> 7. **"Laporan Jawatan kuasa Kabinet (JKK)**" telah mengumumkan secara khusus ayat dan perkataan **"High Portal"** yang pada saya ianya mencerminkan **"Kemahiran Tinggi"**. Justeru itu sebutan **"Portal"** boleh mencerminkan sebagai pengalaman **"Biasa"** yang boleh ditakrifkan

A sebagai **"rendah"**. Memandangkan kepada situasi ini, maka pada saya urusan pelarasan pencen yang telah disempurnakan oleh JPA sedemikian tidak lari **peraturan dan hak akta**. Proses ini bukannya bertujuan menghalang kepentingan mana-mana pihak dan ianya juga bukan boleh dituduh sebagai suatu **penyalahgunaan process (Abuse of Process)** kerana di bawah satu istilah jawatan yang sama **"Pemandu Keren"** telah
B melahirkan dua pengenalan masing-masing di bawah **"High"** dan **"Low"**

[36] Subsequently, the first respondent in a letter dated 13 May 2008, rejected the applicant's appeal on the grounds that the words "high portal" reflected a higher skill to undertake more complex works and responsibilities, which is in line with the opinion expressed by KTMB's
C Human Resource Department's Advisor. It went on to state that, therefore, "high portal" crane drivers were put at a higher salary scale than "portal" crane drivers. It concluded by stating that the decision to put the applicant at the salary grade D38 for crane drivers (low carriage) is correct. Paragraph 4 of the letter is reproduced below:

D

> 4. Selain itu, perkataan "high portal" itu sendiri mencerminkan bahawa jawatan Pemandu Kren (High Portal) mengehendaki penyandangnya mempunyai "kemahiran tinggi" bagi menjalankan tugas dan tanggungjawab yang lebih kompleks. Dengan syarat-syarat sedemikian, maka ianya diletakkan di tanggagaji yang lebih tinggi berbanding
> E Pemandu Kren (Portal). Memandangkan tuan hanya dilantik sebagai Pemandu Kren (Portal), maka adalah tidak wajar untuk meletakkan tuan di Gred D5 (JKK) dan oleh yang demikian, tindakan Ketua Jabatan tuan mengunakan tanggagaji D38 adalah betul.

Was The First Respondent's Decision Rational?

F **[37]** In deciding whether the first respondent's basis for rejecting the applicant's appeal is rational and logical, this court must first look at the natural and ordinary meaning of the word "crane" and "portal".

(i) "Crane" is defined as:

G - "an often horizontal projection swinging about a vertical axis, such as a machine for raising, shifting, and lowering heavy weights by means of a projecting swinging arm or with the hoisting apparatus supported on an overhead track".[1]

- "a tall metal structure with a long horizontal part, used for lifting
H and moving heavy objects."[2]

(ii) "Portal" is defined as:

- Door or entrance especially a grand or imposing one[3]

- A large, important entrance to a building.[4]

I

[38] As evidenced in the first respondent's letter of 13 May 2008, it decided to take into account the opinion of KTMB's Human Resource Department Advisor, Encik Mohamad Abas, as to what is meant by "portal"

and "high portal". Encik Abas in his letter of 25 February 2008 stated that in his opinion "high portal" means "high skill" and that "portal" means "normal experience" or "low skill". A

[39] His view of "portal" means is clearly not in accordance with the actual definition of "portal" in the English language dictionaries quoted above. It is clear from the dictionaries that "portal" is defined as a door or entrance. "Portal" does not mean, as opined by Encik Abas, "normal experience" or "low skill". Neither does "high portal" mean, as opined by Encik Abas and echoed by the first respondent, "high skill" thus enabling the "high portal" person to undertake work and responsibilities which are more complex. During her submissions, the Federal Counsel acting for the first respondent equated "high portal" and "portal" to "Senior Federal Counsel" and "Federal Counsel", which, I respectfully find, based on the definition of the word "portal" and the word "counsel", difficult to understand. B C

[40] A crane is a "tall metal structure with a long horizontal part, used for lifting and moving heavy objects". It can be assumed that the portal is high since the applicant was the driver of a "tall metal structure with a long horizontal part" to lift and move objects at the port's or ship's portal. The question is why was the job description changed from "crane driver (portal)" to "crane driver (high portal)". D

[41] Accordingly, in my view, the logical and reasonable step that the first respondent should have taken, was to first find out what was the meaning of the word "portal" and "crane". E

[42] Secondly, taking into account the definition of the word "portal" and the word "crane", the first respondent should have clarified with Lembaga Pelabuhan Klang why the job of the portal crane drivers at Port Klang was described as "high portal' on 1 July 1980 and ask the Lembaga whether the word "high" referred to the skill of the driver or the height of the portal. F

[43] The applicant was loaned by KTMB to work as a crane driver (portal) at Port Klang prior to his retirement. It is only logical that, the person with the knowledge as to what is meant by the job crane driver (portal) and crane driver (high portal) would be a person in Lembaga Pelabuhan Klang involved in port operations. G

[44] The applicant had worked under the supervision of Mr Paramas Varan Kandiah, who was the Assistant Wharf Superintendent of Port Swettenham from 17 June 1963 to 10 October 1969. Mr Paramas Varan Kandiah in a letter dated 1 June 2010 from the Koperasi Keretapi Berhad to the first respondent confirmed that Port Swettenham only used portal cranes and low carriage crane on the wharves. He stated that at that time, portal cranes are considered as portal cranes and high portal cranes; and that the crane drivers can be asked to work on any crane based on the discretion of the respective Port officers. H I

[45] In my considered view, in making its decision as regards the applicant's appeal, it would have been reasonable for the first respondent to have taken into account Mr Kandiah's explanation of what the job entailed since he was the Assistant Wharf Superintendent of Port Swettenham at the material time. Instead, the first respondent chose to base its decision on the personal opinion of KTMB's Human Resources Department's Advisor of what "high portal" and "portal" means.

[46] I find that the first respondent's decision to dismiss the applicant's appeal to readjust his pension from the last drawn salary of a crane driver (low carriage) at salary grade D38 to that of crane driver (high portal) at salary grade D5 as irrational and unreasonable.This is because in arriving at its decision to dismiss the applicant's appeal, the first respondent failed to take into account relevant information, namely,

(i) the meaning of the word "portal" as defined in the English language dictionaries;

(ii) the written statement of Port Klang's Assistant Wharf Superintendent, who had worked at Port Klang at the material time and who was the applicant's supervisor, that portal cranes are considered as portal cranes and high portal cranes; and

(iii) that at the time of the applicant's retirement, there was no position described as crane driver (high portal). There were only the position of crane driver (portal) and crane driver (low carriage). And that under the JKK salary scheme, there was no position described as crane driver (portal); there was only crane driver (high portal).

[47] Instead, inexplicably, the first respondent chose to take into account irrelevant information, ie, the opinion of KTMB's Human Resources Department's Advisor as to what is meant by the word "portal" and "high portal". There is no evidence that the KTMB's Human Resources Advisor is a linguist or an expert in the English language or had actual knowledge of port operations at Port Klang.

Was It Procedurally Proper To Adjust The Applicant's Pension To That Based On A Lower Position Than The Position He Held At The Time Of His Retirement?

[48] The Federal Counsel's submission in para. 2 of his written submission that the applicant received a pension as crane driver (low carriage) D38 at the time of his retirement on 5 March 1971 is factually incorrect. KTMB confirmed and his pension documents show that the applicant had retired as a crane driver (portal).

[49] I find that the first respondent's decision to adjust the applicant's pension on 1 July 1980 based on the last drawn salary of crane driver (low carriage) from crane driver (portal), just because the new salary classification under JKK II was crane driver (low carriage) and crane driver (high portal), to be procedurally improper and contrary to the rules of natural justice.

[50] The last drawn salary for crane driver (low carriage) is less than that of a crane driver (portal). Therefore, I find that it is against the rules of natural justice for the first respondent to adjust the applicant's pension based on a position that was lower than the applicant's position at the time of his retirement in 1971.

[51] The applicant had a legitimate expectation that his pension will not be adjusted under the PAA 1980 to the last drawn salary of a position that is lower than the position he had held at the time of his retirement in 1971. In this instant case, the adjustment by the first respondent of the applicant's pension to the salary grade D38, which is based on a lower position than the position he had retired at, resulted in a situation that is less favourable to the applicant.

[52] In my opinion, an adjustment that results in a situation which is less favourable for a pensioner than before the coming into force of the PAA 1980, is also against the spirit of the PAA 1980 embodied in s. 3 of the Act. Section 3 of the PAA 1980 provides that:

> (1) Pensions and other benefits granted to officers and their dependants under any written law shall be adjusted annually by an increment of two percent in accordance with the provisions of this Act and shall be paid or be payable with effect from January of each year.
>
> (2) Notwithstanding subsection (1), where the application of the specified rate of increment **would result in a situation that is less favourable to an officer appointed before the coming into force of this section,** the Yang di-Pertuan Agong may by order in the *Gazette* **prescribe an appropriate higher percentage of increment to be applied in such case.** (emphasis added)

[53] As discussed above, the first respondent had received sufficient information to redetermine the applicant's pension based on the salary grade D5 (JKK). The first respondent is, accordingly, obliged under s. 13A of the PAA 1980 to redetermine the proper amount of pension payable to the applicant based on the information he had received. Section 13A of the PAA 1980 states when the first respondent receives "such information as is sufficient to enable him to redetermine the proper amount of pension or other benefit payable, he shall redetermine the same". As discussed above, in making the redetermination, the first respondent should take into account relevant information instead of irrelevant information.

[54] For the reasons above, I find that the first respondent has a duty to act fairly to correct its wrongful adjustment of the applicant's pension to crane driver (low carriage) at salary grade D38. Hence, it is under a duty to readjust the applicant's pension to crane driver (high portal) at salary grade D5, which is the position and salary grade under JKK II equivalent and/or closest to the position that the applicant was holding at the time of his retirement. The applicant also has a legitimate expectation that the first respondent will

readjust his pension to the position and salary grade under JKK II equivalent and/or closest to the position that the applicant was holding at the time of his retirement.

Finding

[55] Accordingly, for the reasons above, I find that the first respondent's decision to dismiss the applicant's appeal and its refusal to readjust the applicant's pension based on the last drawn salary equivalent to salary grade D5 of a crane driver (high portal) to be irrational, unreasonable and procedurally improper.

Decision

[56] For the reasons above, this court makes the following orders:

(i) An order of *certiorari* to quash the decision of the first respondent to reject the applicant's appeal for an adjustment of his pension based on last drawn salary equivalent to grade D5 (JKK) from 1 July 1980 as stated by Puan Fazidah binti Ahmad Puat in a letter dated 5 September 2016 from the Bahagian Pasca Perkhidmatan, Jabatan Perkhidmatan Awam Malaysia.

(ii) An order of *mandamus* directing the first respondent:

(a) to redetermine the proper amount of pension payable to the applicant based on the last drawn salary for the position of crane driver (high portal) at the salary grade of D5 (JKK); and

(b) upon the redetermination under sub-para. (ii)(a) above, to pay the proper amount of pension to the applicant together with arrears from 1 July 1980.

[57] The respondents are to pay the applicant costs in the sum of RM50,000 subject to the payment of the allocatur fee.

Order

[58] So ordered accordingly.

Endnotes:

1. Merriam-Webster Dictionary
2. Cambridge Dictionary
3. Merriam-Webster Dictionary
4. Cambridge Dictionary